Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–22–319 OF 1999
KAMALANATHAN RATNAM J
18 JANUARY 2000

Civil Procedure *— Injunction — Ex parte injunction set aside — Whether there should be separate application made inter partes for further injunction — Rules of High Court O 29 r 1(2B)*

Civil Procedure *— Estoppel — Against defendants for contesting action — Filing of fresh application — Whether defendants had by their conduct led plaintiff to believe there was no need to file fresh application*

The plaintiff by way of encl 9 applied ex parte for various orders against the defendants in the nature of a mareva injunction, anton piller orders and disclosure orders. The defendants applied to set aside the ex parte injunction. The plaintiff contended that it was still open to it to have encl 9 heard inter partes, for an injunction on the same terms as encl 14. The defendants' case was that encl 9 was jurisdictionally spent. They also argued that as a matter of procedural law and as a construction of O 29 rr 1 and 2 of the Rules of the High Court 1980 ('the RHC'), there must be a separate application made inter partes by the plaintiff for any further injunction in the same proceedings. The issue before the court was whether it was open to the plaintiff to rely on encl 9 to obtain an injunction on an inter partes basis after the ex parte order given based on encl 9 had been set aside. The defendants raised a preliminary objection which was heard and dismissed with costs. The defendants appealed against the dismissal.

Held, dismissing the defendants' preliminary objections with costs:

(1) Once the court had on its own motion granted an inter partes hearing date well before the expiry of the 14-day period, it meant that notwithstanding the fact that the ex parte order would automatically expire after the 14 days or notwithstanding the fact that the said order could be set aside, the inter partes hearing must go on on the date fixed or as extended. After all, the ex parte order stood only on the affidavit filed in support, whereas on the inter partes hearing date, both sides would have filed their respective affidavits and the court would have the benefit of details and explanations not necessarily contained in the affidavit in support of the ex parte application (see p 769A–C).

(2) In any case, O 92 r 4 of the RHC provides that the court has an inherent jurisdiction to regulate its own affairs and the manner in which these affairs are regulated. If the submission that the application itself was jurisdictionally spent was to be accepted, it meant that the plaintiff would have to merely refile and reserve the

same application to make it inter partes. This clearly was not what the law intended, that was, to make matters difficult for litigants. The purpose was achieved by converting the ex parte application into an inter partes application by the court breathing life into it by giving the inter partes date. A breach of the rules cannot result in the ex parte application being held as jurisdictionally spent (see pp 769D–F, 770C).

(3) The conduct of the defendants have estopped them from raising the preliminary issue. By agreeing to have the inter partes application argued immediately after the setting aside of the ex parte order was given, the defendants had by their conduct led the plaintiff to believe that there was no need to file a fresh application. If the defendants had raised even a query at that stage, the plaintiff could have filed a separate inter partes application, even upon a certificate of urgency in order to be in a position to argue the defendant's application to set aside the ex parte order (see p 770D–G).

[Bahasa Malaysia summary

Plaintif melalui lampiran 9 telah membuat permohonan ex parte untuk beberapa perintah terhadap defendant di dalam bentuk injunksi Mareva, perintah-perintah Anton Piller dan perintah-perintah pendedahan. Defendan membuat permohonan untuk mengetepikan injunksi ex parte. Plaintif berhujah yang mereka masih berhak untuk mendapat lampiran 9 didengar atas dasar antara pihak, untuk injunksi atas terma-terma yang sama sebagaimana lampiran 14. Kes defendan adalah atas dasar lampiran 9 melibatkan kehausan bidang kuasa. Mereka juga berhujah, di bawah undang-undang prosedur dan sebagai satu penafsiran A 29 kk 1 dan 2 Kaedah-Kaedah Mahkamah Tinggi ('KMT'), plaintif mestilah membuat dua permohonan antara pihak yang berasingan untuk injunksi selanjutnya dalam prosiding yang sama. Isu yang perlu diputuskan oleh mahkamah ialah sama ada plaintif boleh bergantung kepada lampiran 9 untuk mendapatkan satu injunksi atas dasar antara pihak selepas perintah ex parte dibuat, berdasarkan lampiran 9 diketepikan. Defendan membuat bantahan permulaan yang telah didengar dan ditolak dengan kos. Defendan merayu berhubung dengan penolakan tersebut.

Diputuskan, menolak bantahan permulaan defendan dengan kos:

(1) Sebaik sahaja mahkamah atas usulnya sendiri menetapkan tarikh perbicaraan antara pihak sebelum berakhirnya jangkamasa 14 hari, ini bermakna, walaupun perintah ex parte akan dengan sendirinya berakhir selepas 14 hari atau walaupun perintah itu boleh diketepikan, perbicaraan antara pihak mestilah diadakan pada tarikh yang ditetapkan atau sebagaimana dilanjutkan. Tambahan pula, perintah ex parte adalah berasaskan afidavit yang difailkan untuk menyokong permohonan, walhal pada tarikh perbicaraan antara pihak, kedua-dua pihak telah memfailkan

afidavit masing-masing dan mahkamah pula akan mendapat butiran-butiran terperinci dan penjelasan yang tidak semestinya terdapat di dalam afidavit yang dikemukakan bagi menyokong permohonan ex parte (lihat ms 769A–C).

(2) Dalam sebarang kes, A 92 k 4 KMT memperuntukkan yang mahkamah mempunyai bidang kuasa sedia ada untuk mengawal-selia hal ehwalnya sendiri and bentuk kawalan-selia tersebut. Jika mahkamah menerima hujah yang permohonan tersebut melibatkan kehausan bidang kuasa, ini bermakna yang plaintif cuma perlu memfailkan semula dan merizabkan permohonan dalam bentuk antara pihak. Ini jelas bukannya matlamat undang-undang, iaitu, mewujudkan kesukaran kepada litigan. Tujuan ini dicapai dengan menukar permohonan ex parte kepada permohonan antara pihak dengan sokongan mahkamah melalui penetapan tarikh untuk permohonan antara pihak. Kegagalan mematuhi peraturan tidak menyebabkan permohonan ex parte dianggap melibatkan kehausan bidang kuasa (lihat ms 769D–F, 770C).

(3) Perlakuan defendan telah mengestop mereka dari membangkitkan isu permulaan. Dengan bersetuju supaya permohonan antara pihak didengar sebaik sahaja perintah untuk mengetepikan perintah ex parte dibuat, defendan dengan perlakuan mereka telah menyebabkan plaintif percaya yang mereka tidak perlu memfailkan permohonan baru. Jika defendan telah membangkitkan sekalipun satu soalan yang menimbulkan kesangsian pada peringkat tersebut, plaintif boleh memfailkan satu permohonan antara pihak yang berasingan, malahan berdasarkan perakuan segera untuk membolehkannya didengar berhubung dengan permohonan defendan untuk mengetepikan arahan ex parte (lihat ms 770D–G).]

Notes

For cases on interlocutory injunction generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2112–2180.

For a case on estoppel against the defendants for contesting the action, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1668.

Cases referred to

Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari [1997] 5 MLJ 359 (refd)

Erinford Properties Ltd v Cheshire County Council [1974] 2 All ER 448 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193

Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 6 MLJ 342

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor [1997] 2 MLJ 472 (refd)

Legislation referred to

Rules of the High Court 1980 O 29 rr 1(2), 2, O 92 r 4

Malik Imtiaz (*M Pala* with him) (*Salleh & Associates*) for the plaintiff.

Cyrus V Das (*Elaine Ong* and *Rajesh Jethi* with him) (*Shook Lin & Bok*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

On 29 June 1999 by way of encl 9, the plaintiff applied ex parte for various orders against the defendants in the nature of a mareva injunction, anton piller orders and disclosure orders. These ex parte orders were made by this court pursuant to O 29 r 1(2) of the Rules of the High Court 1980 ('the RHC').

The plaintiff then served the order dated 29 June 1999 (encl 14) upon the defendants on 30 June 1999. On 2 July 1999, the defendants made an oral application inter partes to vary encl 14 to enable the first defendant to carry out his daily business transactions. Whilst disputing the service of the papers the first defendant argued that the ex parte orders granted were too wide as to completely bring the daily business of the defendants to a halt. After hearing submissions I varied my ex parte orders (encl 14) by my order dated 2 July 1999 (encl 19). On 7 July 1999, the defendants applied (encl 25) to set aside the ex parte injunction before the expiry of the 14 day requirement. Pending the disposal of encl 25 I granted a holding over order on an inter partes basis.

The plaintiff did not file a separate application for an inter partes injunction upon the lapse of the ex parte injunction at the end of the 14 days. On 28 September 1999 after hearing extensive arguments, I set aside the ex parte orders and gave an order in terms of encl 25. The plaintiff, seeking a fresh injunction, relied on encl 9 which was the ex parte application already disposed of.

Case for the plaintiff

The plaintiff contended that it was still open to it to have encl 9 heard inter partes this time, for an injunction on the same terms as encl 14. The defendants' case was that encl 9 is jurisdictionally spent. They also argued that as a matter of procedural law and as a construction of O 29 rr 1 and 2 of the RHC, there must be a separate application made inter partes by the plaintiff for any further injunction in the same proceedings.

Issue before the court

The issue before the court was whether it is open to the plaintiff to rely on encl 9 to obtain an injunction on an inter partes basis after the ex parte order given, based on encl 9 had been set aside.

The defendants raised a preliminary objection which I heard on 2 November 1999 and dismissed with costs on 3 November 1999. The defendants have since appealed against the said dismissal.

Is encl 9 jurisdictionally spent?

It is the defence case that as a matter of procedural law and pursuant to O 29 rr 1 and 2 of the RHC there must be a separate application made inter partes by the plaintiff for any further injunction in the same proceedings. It is necessary to therefore reproduce O 29 rr 1 and 2 which read as follows:

> 1 Application for injunction (O 29 r 1)
>
> (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.
>
> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
>
> 2 Detention, preservation, etc of subject-matter of cause or matter (O 29 r 2)
>
> (1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

The defendants pointed out that at all material times the only pending application before the court was encl 25 which was the defendants' application to set aside the ex parte order, since there was no separate application by the plaintiff for an inter partes injunction upon the lapse of the ex parte injunction at the end of the 14 days. It is the case of the defendants that encl 9 (the ex parte application) is now a spent force because the order that was sought under that application has been drawn up, sealed and even enforced. The defendants emphasised that encl 9 was specifically made under O 29 r 1(2).

It is trite that after *Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari* [1997] 5 MLJ 359 any doubt or ambiguity as to the life span of an ex parte order was put right, the court holding that O 29 r 1(2B) of the RHC clearly specifies a life span for the ex parte injunction and does not contemplate an 'unless otherwise extended' order. O 29 r 1(2B) reads as follows:

1 Application for injunction (O 29 r 1)

...

(2B) Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse at the end of two weeks from the date on which it is granted.

The Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 observed that under r 1(2B) the interim injunction automatically lapses and there is thus a need for the plaintiff to reapply for the interim injunction. Again the Court of Appeal in *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472 emphasized the importance of determining whether the injunction applied for was meant to be an ex parte or an inter partes injunction by emphasizing that r 1(2B) would have no relevance to an inter partes application. It is now accepted as set law that O 29 r 1(2B) is a mandatory provision and that the ex parte injunction automatically lapses at the end of 14 days 'unless sooner revoked or set aside'. I have also said in *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 6 MLJ 342, after considering the effect of O 29 r 1(2B) that 'any further injunction will have to be obtained by making a fresh application heard inter partes'.

Based on all these views the defendants argued that there must be a separate inter partes application that must be made. I must also remind myself that in *Keet Gerald* the Court of Appeal said at p 213 that 'there is need for the appellant to reapply for the interim injunction'.

The defendants advocated that the remedy of the plaintiff must be to appeal against the decision setting aside the ex parte order and to apply for an Erinford type of injunction, that is to seek a restorative injunction pending the appeal (see *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448). The defendants contended that having refused the injunction by setting it aside I ought not to revisit my order and review, on the same materials as they stood. I must hasten to point out that when I granted the ex parte order on 29 June 1999, I had directed that the inter partes hearing of the application be heard on 12 July 1999, that is, well within the 14-day period. Since the said ex parte order (encl 14) was served on the defendants on 30 June 1999 the defendants' solicitors appeared before me together with the plaintiff's solicitors on 2 July 1999 to vary the ex parte order. Having varied the order I then vacated the earlier inter partes hearing date of 12 July 1999 and fixed the hearing of encl 9 as inter partes to 9 July 1999.

On 9 July 1999 counsel for both parties were present and informed me that there were 3 enclosures for hearing, namely, encl 9, encl 16 and encl 38. Enclosure 9 was the inter partes application of the plaintiff for the injunction. Enclosure 38 was the plaintiff's application for leave to commit the first defendant and/or various directors of the first defendant to prison for breaching the ex parte order. Enclosure 16 was the second defendant's application for leave to enter conditional appearance and to strike out the writ and claim filed against the second defendant.

By consent both parties agreed that notwithstanding the earlier three enclosures, I ought to hear arguments as to whether encl 38 ought to be

A heard before I heard the defendants' application to set aside the injunction (encl 25). After hearing full arguments from both parties I decided to hear encl 25. As the submissions were taken together I gave an order in terms of encl 25 and set aside the ex parte order and fixed the hearing of the inter partes application. Hence, this preliminary objection.

B I take the view that once the court has on its own motion granted an inter partes hearing date well before the expiry of the 14-day period, it means that notwithstanding the fact that the ex parte order would automatically expire after the 14 days or notwithstanding the fact that the said order could be set aside, the inter partes hearing must go on on the date fixed or as extended. After all the ex parte order stands only on the affidavit C filed in support, whereas on the inter partes hearing date both sides would have filed their respective affidavits and the court will have the benefit of details and explanations not necessarily contained in the affidavit in support of the ex parte application.

It can be argued as in this case by the defendants that once the D application to set aside the order is fully heard, then the necessary affidavits are already there for the court's consideration. Whilst this may be so, it need not necessarily be so because parties may wish to hold back certain issues at the striking off stage due to relevancy and may wish to include those issues at the inter partes injunction stage always bearing in mind the need for full and frank disclosures. In any case, O 92 r 4 of the RHC provides that the E court has an inherent jurisdiction to regulate its own affairs and the manner in which these affairs are regulated. To my mind, if the submission that the application itself is jurisdictionally spent is to be accepted, it means that the plaintiff would have to merely refile and reserve the same application to make it inter partes. This clearly is not what the law intends, that is, to make matters difficult for litigants. The purpose is achieved by converting the F ex parte application into an inter partes application by the court breathing life into it by giving the inter partes date.

The defendants rely on O 29 r 1(2) and the numerous cases earlier referred to. However, none of these cases nor does O 29 r 1(2) say that a separate written application ought to be made. Whilst even I have held in G *Kepong Industrial Park* that a further injunction would have to be obtained by making a fresh application, I did not intend that a separate and fresh written application ought to have been made. The converted ex parte application supported by fresh and further additional affidavits is the fresh application that I was referring to. Of course it is up to the plaintiff if it so intends, to file a fresh application. All that is important to note is that H pursuant to O 29 r 2(5) read together with O 29 r 1(2), the court must be moved by summons, not a separate summons. The rules would have said so, if this was what was intended.

In any case, assuming, argumendo that the plaintiff is right that a separate application must be filed (which I have held is not the correct I view), then the question arises, does non-compliance with the provisions of O 29 rr 1 and 2 affect jurisdiction. I hold that it cannot because non-compliance merely amounts to irregularity (see O 92 r 4 of the RHC). In *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565, the

Federal Court, in a case where the appeal involved an issue as to whether a judgment in default had been obtained in compliance with the rules, said at p 578 as follows: A

> Any proceeding commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O 2 r 1 of the Rules of the High Court 1980 ('the RHC'). Whether a particular proceeding should be cured is, of course, a matter of discretion for the court whose assistance is prayed in aid to effect the cure. It is wrong to assume that the court is obliged in every case to overlook the breach of a rule of court. For that would mean that a litigant may honour the RHC more by breach rather than by observance. This is certainly not the law. B
>
> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. C

In the circumstances, even if the defendants are right, which I have held they are not, a breach of the rules cannot result in the ex parte application being held as jurisdictionally spent. D

Estoppel

I also hold that the conduct of the defendants have estopped them from raising this preliminary issue. It is a fact that during the submissions made by both parties as to whether I ought to hear encl 25 first or the application for contempt, it was agreed that in the event encl 25 was set aside, the E hearing of the inter partes application was to be proceeded with and that this was indeed to have been proceeded with on the day the decision was to be delivered. Now surely the parties must have intended that since the hearing date for the inter partes hearing had been given on the ex parte application itself, it was this very same converted ex parte application that would be heard and not a freshly filed application because there was no such freshly F filed application in the court file. To my mind, the Federal Court's decision in *Lai Yoke Ngan* is clear authority for the proposition that by agreeing to have the inter partes application argued immediately after the setting aside of the ex parte order was given, the defendants have by their conduct led the plaintiff to believe that there was no need to file a fresh application. If the G defendants had raised even a query at that stage, the plaintiff could have filed a separate inter partes application, even upon a certificate of urgency in order to be in a position to argue the inter partes application as soon as I had given my decision on encl 25 which was the defendant's application to set aside the ex parte order. I therefore dismissed the preliminary objections with costs. H

Preliminary objections dismissed with costs.

Reported by Ezatul Zuria Azhari

I